the Ordinance, speaks more eloquently than words. Consequently the finding of fact against the tenant, who has not appealed, concludes the matter so far as this appellant is concerned. For my own part, I would grant little credit to a party who claimed, in the first place, that the Ordinance did not apply and now contends that it did. In any event, I think this appellant has no cause for complaint whatsoever since he has managed to hold on till now to premises which, under the very agreement constituting his asserted title to occupation, he should have vacated by October 12, 1965, almost two and a half years ago.

Above everything else is the fact that learned counsel for the appellant now sets up a case which not only is not founded upon, but contrary to, this appellant's own pleadings. We should be creating an absurd precedent to consider allowing this appeal, on any ground, without even any application for consequential amendment of the defence pleaded. Any amendment, at this stage, setting up a case which amounts to a *volte-face*, is naturally out of the question.

I would accordingly dismiss this appeal and affirm the judgment of Ismail Khan J., including his order as to costs; his judgment clearly shows that he had borne in mind the proviso to section 13 when making such order. I would also award the respondent the costs of this appeal for the same reason.

Raja Azlan Shah J.: The learned judge has delivered an elaborate and, in my view, a most convincing judgment with which I agree.

I venture to express my own view on the question of double rent which the learned judge ordered against both the tenant and the sub-tenant, *i.e.* the present appellant on the expiry of the sixty days period in the event of their holding over. In my judgment, there was clearly an order for delivery of possession against both the tenant and the sub-tenant who the learned judge found has forfeited his claim to the protection of the provisions of section 19 of the Control of Rent Ordinance 1956. In those circumstances it must follow that in view of the provisions of section 28(4) of the Civil Law Ordinance 1956 read with section 22 of the Control of Rent Ordinance the learned judge was justified in ordering double rent against both the tenant and the present appellant. The decision of this court in the case of *Ong Keng Huat* v. *Shaw & Shaw Ltd.*[4] must be distinguished on the facts. There the learned trial judge had no power to give judgment in accordance with the landlord's claim for double rent from November 30, 1954 which was the date the tenant was asked to deliver up vacant possession. It is quite plain that as on that date no court order for recovery of possession was made against the said tenant and consequently the case was hit by the provisions of section 13(4) of the Civil Law Ordinance (Laws of the Straits Settlements, Vol. II, Cap. 42, which bears semblance to section 28(4) of our Civil Law Ordinance) read with section 17 of the Control of Rent Ordinance 1948 (now section 22).

I agree that the whole appeal be dismissed.

Appeal dismissed.

Solicitors: *Sault, Keith Sellar & Co.; Shearn, Delamore & Co.*

YANG CHIN LANG v. TAN CHONG & SONS MOTOR CO. LTD.

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Ong Hock Thye F.J.) February 19, 1968]

[K.L. — Federal Court Civil Appeal No. X85 of 1966]

Contract — Guarantee — Construction — Credit facilities in excess of maximum amount guaranteed — Effect of, on guarantee.

Stare decisis — Case indistinguishable on facts.

On February 19, 1964, the appellant signed a letter of guarantee as guarantor for the debt due by his son who, as agent of the respondents, cardistributors, had been supplied with cars on credit for sale by him. The relevant part of the letter of guarantee stated that the appellant "guarantee the performance and fulfilment by the said Yang Pin Joo of any obligation and liabilities due from him to you on the understanding that:— (a) the maximum credit balance monthly shall not exceed $100,000". There was $129,911 due to the respondents by the appellant's son at the date of the letter of guarantee. The letter of guarantee was signed in consideration of the respondents' forbearance to sue the appellant's son and to grant further credit facilities to him. In an action by the respondents on the letter of guarantee, the trial judge held that the appellant was liable on the guarantee to pay the respondents $100,000 ([1967] 1 M.L.J. 123). On appeal, the appellant contended that he was relieved from liability as the credit facilities given to his son, having exceeded $100,000, was contrary to condition (a) of the letter of guarantee and was therefore void *ab initio*.

Held, dismissing the appeal: the learned trial judge did not misdirect himself that the case of *Oriental Bank of Malaya Ltd.* v. *Subramaniam* (1) was applicable and the decision of the trial judge should be affirmed.

Cases referred to:—

(1) *Oriental Bank of Malaya Ltd.* v. *Subramaniam* [1958] M.L.J. 35, C.A.

(2) *Lloyd's* v. *Harper* (1880), 16 Ch. D. 290.

(3) *Blest* v. *Brown* (1862), 6 L.T. 620; 4 D.F. & J. 367.

(4) *Ward* v. *The National Bank of New Zealand* (1883), 8 App. Cas. 755 at p. 763.

(5) *Rickaby* v. *Lewis* (1905), 22 T.L.R. 130 at p. 131.

FEDERAL COURT.

S. K. D. Peddie for the appellant.

V. K. Palasuntharam (*Eugene Lye* with him) for the respondents.

Barakbah L.P.: The question to be determined in this appeal is whether the appellant is

liable to the respondents as guarantor of a debt due by his son who, as agent of the respondent car-distributors, had been supplied with cars on credit for sale by him.

The learned trial judge, Gill J., having seen and heard the witnesses on both sides, disbelieved the appellant and Yang Pin Joo, his son, and held that "the truth of the matter lies in the evidence of the plaintiffs' witnesses". He succinctly summed up the facts of the case as follows:—

"From the evidence produced it is abundantly clear what the surrounding circumstances relating to the guarantee were. Yang Pin Joo was heavily indebted to the plaintiffs. The plaintiffs threatened to cancel his agency and to sue him to recover the debts unless he found a guarantor. He spoke to his father and the father orally agreed to guarantee Yang Pin Joo's account to the extent of $100,000. In consequence of that guarantee the plaintiffs wrote to Yang Pin Joo their letter dated 27th January, 1964 that they had increased his credit facilities to $100,000 and asked him to pay off his debts in excess of $100,000. Subsequently the defendant went with a letter of guarantee to the plaintiffs' office and there signed it. Those are my findings of facts as to the surrounding circumstances and, to my mind, they are sufficiently borne out by the evidence."

With respect, I am in complete agreement with the learned judge's findings of fact. The grounds of appeal do not question the correctness of these findings. The appellant accordingly was left with no alternative but to complain that the judgment was wrong in law. In particular, it was contended that the learned judge had misdirected himself, not only in holding that the case of *Oriental Bank of Malaya Ltd.* v. *Subramaniam* [1] was relevant, but also in failing to distinguish between the terms of the guarantee there and in the instant case. I would observe that the main ground of defence here reveals a striking similarity to that raised by Mr. Subramaniam, as though modelled on it. In that case, decided a decade ago, it was the defendant's contention that he had only guaranteed the debt of the principal debtor incurred in respect of advances made by the bank after the date of the guarantee and not the pre-existing overdraft. Reliance was placed on the terms of the guarantee, the material words of which were:—

"In consideration of your having at my . . . . request agreed to allow N. Krishnan to overdraw on his . . . . current banking account with you to the extent of $25,000 . . . . I the undersigned hereby . . . . guarantee the repayment etc."

It was, however, held by the Court of Appeal, following Fry J., in *Lloyd's* v. *Harper,*[2] (i) that the guarantee must be construed reasonably, having regard to the surrounding circumstances; and (ii) that in the light thereof, the overdraft mentioned in the guarantee was the overdraft already in existence prior thereto. In the instant case, the relevant term in the letter of guarantee was that "the maximum credit balance monthly shall not exceed $100,000", on which was based the argument that the appellant was relieved of liability because the balance each month was permitted to exceed the stated maximum figure; alternatively, that the guarantee was void *ab initio* for the same reason; in the further alternative, that the guarantee was in respect of advances made only after the date of such guarantee. On all these points, my views are precisely the same as those of Gill J., and the appeal, in my judgment, fails. The alleged breach of two subsidiary terms (b) and (c) of the letter of guarantee, were carefully considered also by the learned judge. With his conclusions I entirely agree and do not think I need add a single word.

I would accordingly affirm the judgment of Gill J., and dismiss this appeal with costs.

Azmi C.J. (Malaya): This is an appeal against the judgment of the High Court at Kuala Lumpur in favour of the respondent for $100,000 and costs.

The relevant facts may be summarised as follows:—

The appellant, the defendant in the suit and will be referred to as such hereinafter, is the father of one Yang Pin Joo and signed a letter of guarantee, as the guarantor for the debts owing by Yang Pin Joo to the plaintiff respondent in connection with Yang Pin Joo's business of a car dealer.

The plaintiff was a car distributor and according to his director P.W.1, the credit facilities up to November 1963 granted to Yang Pin Joo amounted to about $123,000.

P.W.1 stated that in consideration of his forbearing to sue Yang Pin Joo for the said debt and granting further credit facilities to him, the defendant signed the letter of guarantee.

The defendant in his statement of defence, among other things:—

(a) pleaded that the plaintiff having alleged that the guarantee was for a fixed sum of $129,518.40 could not now claim against him (the defendant) on the basis that the guarantee was a continuing security for an account to be running on and

(b) that by reason of non-fulfilment of conditions (a) and (c) of the letter of guarantee he was released from liability;

(c) that the letter of guarantee was given for the sole purpose of future credit facilities of Yang Pin Joo on the basis of a running account and not for a payment of a fixed account of $129,518.40 and that the account supplied by the plaintiff in respect of dealings between the plaintiff and the said Yang Pin Joo after the execution of the letter of guarantee, the first of which was on the 29th February 1964. showed that all credit facilities extended to Yang Pin Joo by the plaintiffs, was satisfied by Yang Pin Joo either in the form of payment made by him or credits given by the plaintiff and there is nothing due and owing by Yang Pin Joo in respect of transactions and accounts after the 19th February 1964 and in consequence there was nothing due by the plaintiff in his capacity as guarantor.

The numerous letters from the plaintiff to Yang Pin Joo in the bundle of documents marked Exhibit P.1 would appear to support P.W.1's evidence that Yang Pin Joo had not been settling his accounts with plaintiff as he should have done and on 22nd January 1964, the amount due to the plaintiff by Yang Pin Joo was $213,668.10, which according to letter dated 27th January 1964, exceeded the maximum facilities of $100,000 previously agreed between the two of them. The letter also suggested that Yang Pin Joo approach his father, the defendant to raise more money for his business.

On 19th February 1964, the defendant signed the letter of guarantee, the relevant part of which reads as follows:—

". . . . I, the undersigned, Yang Chin Lang of 20, Jalan Raja Bot, Klang, Selangor, hereby guarantee the performance and fulfilment by the said Yang Pin Joo of any obligation and liabilities due from him to you on the understanding that:—

(a) The maximum credit balance monthly shall not exceed $100,000 (dollars one hundred thousand only).

(b) Settlement of all vehicles sold by him within 75 days after purchase by him.

(c) In the event of his failure to settle you within 75 days after his purchase of your vehicles, you shall have first right to collect from the hirers of said vehicles outstanding dues in respect of said vehicles sold to them and to take over within twenty-four hours all his assets to offset any balance owing to you and it is further expressly agreed that I will indemnify you for any balance still owing you after all the collections from all hirers of said vehicles and the realisation of his assets have been taken into account.

Signed Yang Chin Lang."

According to the letter at page 16 of Exhibit P.1, executed 5 days after the letter of guarantee was signed, Yang Pin Joo signed an undertaking to the plaintiff that he agreed to pay off the sum of $29,911 in 4 payments, and this would bring the balance due by him to $100,000. He must, however, make the last payment on the 5th May 1964.

In reference to this matter P.W.1 explained that he had a discussion with Yang Pin Joo with a view to getting Yang Pin Joo to pay off the above sum of $29,911 so that the balance due by him would be brought within the amount guaranteed by his father.

The subsequent letters in Exhibit P.1 would appear to corroborate plaintiff's evidence that Yang Pin Joo had not been settling his account as he should have done, so that in November 1964, P.W.1 thought that his trading with Yang Pin Joo had not been satisfactory as his debts to the company were increasing. Therefore, on the 28th November 1964, he wrote a letter to the defendant wherein he pointed out that the amount due by Yang Pin Joo stood at $136,943.28 as at 1st November 1964 and he therefore demanded that the defendant pay $100,000 as guaranteed by him. Both the defendant and Yang Pin Joo maintained in their evidence that what was guaranteed by the defendant was for Yang Pin Joo's running account beyond the first $100,000 or as Yang Pin Joo puts it:—

"What I meant was that the plaintiff company had allowed me credit facilities up to $100,000 without any guarantee and that they were prepared to give me further credit facilities of $100,000 if I could find a guarantee."

The defendant himself expressed it thus:—

"P.W.1 told me that as he wanted my son to expand his business in Butterworth he had asked me to come to the office to make a further guarantee of $100,000. After P.W.1 told me this I signed the letter of guarantee. If I had not signed the guarantee my son's business would have still continued to flourish."

In reference to paragraphs (a), (b) and (c) of the letter of guarantee no evidence was given by the defendant or Yang Pin Joo. That point, however, was argued by counsel for the defendants and counsel referred to *Chitty* on Contracts (21st Edn.) Vol. 2 page 467 and also *Oriental Bank of Malaya Ltd.* v. *Subramaniam* [1] in support of counsel's contention that the letter of guarantee must be construed in regard to the surrounding circumstances.

Before us here, the appeal was however, argued substantially on the basis of the credit facilities given to Yang Pin Joo by the plaintiff having exceeded $100,000 contrary to condition (a) of the letter of guarantee the surety was not bound by it. In support counsel referred to several English cases for example: *Blest* v. *Brown*,[3] *Ward* v. *The National Bank of New Zealand*,[4] *Rickaby* v. *Lewis* [5] and others.

The main contention was to the effect that a surety is bound merely according to the proper meaning and effect of the written engagement that he had entered into and that a surety is discharged by the creditor dealing with the principal in a manner at variance with the contract, the purpose of which the surety had guaranteed. In the result this court is asked to consider paragraph (a) of the letter of guarantee and that the advance given to Yang Pin Joo having exceeded $100,000 or not having been brought within that sum, the defendant as the guarantor was not bound by the guarantee.

I have very carefully gone through the whole evidence of the defendant and his son and I am unable to find in their evidence any reference as to paragraph (a) of the letter of guarantee. On the other hand in his pleadings the defendant said:

"that the letter of guarantee was given for the sole purpose of securing future credit facilities for Yang Pin Joo on the basis of a running account . . . ."

In my view on the authority of *Oriental Bank of Malaya Ltd.* v. *Subramaniam*,[1] the court in this case may consider the circumstances of the whole case in interpreting the intention

of the parties. And having regard to what I have stated previously I am inclined to the view that the guarantee made by the defendants, was to use the words of section 82 of the Contracts (Malay States) Ordinance 1950, "a continuing guarantee" (corresponding to section 129 of the Indian Contract Act).

I would therefore agree with respect to the the following finding of the learned trial judge:—

"It is clear from the evidence in what manner the language of the guarantee was related to the existing facts, namely, that the defendant's guarantee was to extend up to $100,000 irrespective of Yang Pin Joo's monthly debit balance. Condition (a) of the guarantee, therefore, meant nothing more than that the defendant's liability under the guarantee was limited to $100,000, which is the amount for which he has been sued."

As I understood Mr. Peddie, his main point in his appeal is in reference to condition (a) of the letter of guarantee. In any case, in my view, the learned trial judge had dealt fully with the conditions in (b) and (c) of the guarantee and I see no reason why I should interfere with the conclusions made by him.

I would therefore dismiss the appeal with costs.

Ong Hock Thye F.J.: I agree and have only to add that, in my judgment, *Oriental Bank of Malaya Ltd.* v. *Subramaniam* [1] is, on the facts, so indistinguishable from the instant case that we are bound by *stare decisis* to follow it. I, too, would dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Skrine & Co.; Eugene Lye & Co.*

YEOH BONG PENG v. LIM PHAIK LIN

[A.C.J. (Ong Hock Sim J.) March 23, 1968]
[Penang — Civil Appeal No. 4 of 1967]

Landlord and Tenant — Subletting — Services of local authority — Consideration of reasonableness to make order — Control of Rent Ordinance, 1956 s. 12(1)(j).

The respondent/landlord brought an action against the appellant/tenant for the recovery of rent-controlled premises under section 12(1)(j) of the Control of Rent Ordinance, 1956. The learned president of the sessions court made an order for the recovery of the premises. In an appeal against this decision, the appellant relied on two main issues: (i) that there was no prohibition against subletting and, even if there was, the appellant was not in breach of section 12(1)(j) of the Ordinance; (ii) that the learned president had failed to consider whether it was reasonable to make the order.

Held, dismissing the appeal: (1) on the appellant's own admission there was evidence of a receipt of rent from the subletting contrary to section 12(1)(j) of the Ordinance;

(2) the burden was on the appellant to adduce evidence to show the payments made for services rendered by the local authority;

(3) as the claim for the recovery of possession was under section 12(1)(j) of the Control of Rent Ordinance, 1956, the court was not required to consider whether it was reasonable to make the order.

Cases referred to:—

(1) *Toh Whye Teck* v. *The Happy World Ltd.* [1953] M.L.J. 171.

(2) *Ng Hoo Kim* v. *K.A. Abdullah & Co.* [1952] M.L.J. 213.

(3) *Tham Sai Mooi* v. *M.S. Thaver* [1954] M.L.J. 187.

CIVIL APPEAL.

Jag-Jit Singh for the appellant.

Lim Kean Siew (*Daljit Singh* with him) for the respondent.

Ong Hock Sim J. (delivering oral judgment): At the commencement of this appeal, counsel for the appellant abandoned a number of the grounds which are specified in the memorandum of appeal and confined himself to 2 issues namely, first whether there is a prohibition against subletting as evidenced by the insertion of the particular note in the rent receipt, and secondly whether the tenant is in breach of section 12(1)(j) of the Control of Rent Ordinance. Counsel for the appellant further urged that the learned president had failed to consider whether it was reasonable to make the order. He also stated that costs should not have been awarded, having regard to section 13 of the Ordinance. I agree with appellant's counsel that the learned president wrongly described P.W.2 as "the clerk employed to collect rent in respect of this premises". I also agree with him that it may perhaps be unfortunate that the appellant had not the services of counsel but from his statement of defence, he apparently seemed to be a little acquainted with the law, as he even referred in his statement of defence that the case ought to be tried in the High Court under the 1941 Ordinance and said that the claim was misconceived and ought to be dismissed.

There is, in my view and on his own admission, evidence of a receipt of rent from the subletting contrary to section 12(1)(j) of the Ordinance. The appellant admitted also that the area sublet was only the front portion of the ground floor and P.W.2 stated this area to be 612 sq. ft. of a double storey building. As stated in the case of *Toh Whye Teck* v. *The Happy World Ltd.* [1]:—

"(1) It is sufficient for the respondent to establish *prima facie* that the rent received by the tenant exceeded in the aggregate 75% of the rent paid to himself; (2) since the respondent has established a *prima facie* case the rent paid to the tenant falls within the section, the burden shifts on to the appellant to show that he is covered by the provisions regarding payment of Municipal services; (3) to hold otherwise would be an unreasonable burden on the landlord."

Section 12(1)(j) reads:—

"where the tenant having sub-let the premises or part thereof received in respect of such sub-letting rents